Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance	)	WT Docket No. 08-165

REPLY COMMENTS OF THE CITY OF SAN DIEGO, CALIFORNIA IN RESPONSE TO THE PETITION FOR DECLARATORY RULING OF CTIA-THE WIRELESS ASSOCIATION

INTRODUCTION AND SUMMARY

THE CITY OF SAN DIEGO (the "City") submits these reply comments in response to the Petition for Declaratory Ruling of CTIA—The Wireless Association ("CTIA"). The City urges the Commission to deny the Petition filed by CTIA. As noted below, CTIA's Petition is without merit and without basis in law or fact. The CITY OF SAN DIEGO also joins in the Comments that the National Association of Telecommunications Officers and Advisors ("NATOA"), the League of California Cities, the California State Association of Counties and the City and County of San Francisco (comments of those four entities together referred to herein as "League of California Cities") and SCAN NATOA, Inc. ("SCAN NATOA" which is the California and Nevada Chapter of NATOA) filed in response to CTIA's Petition.

DISCUSSION

I. THE WIRELESS CARRIERS FAIL TO TAKE INTO ACCOUNT CONGRESSIONAL INTENT AND STATE AND LOCAL LAWS

CTIA contends in its petition that the Commission should make it clear that a local government has "failed to act" for purposes of 47 U.S.C. Section 332(c)(7)(B)(v) if the local government does not take a final action within 45 days for collocation requests and 75 days for any other wireless facility application. In its comments, the League of California Cities explains how these "arbitrary and inflexible" time limits contradict the plain words and explicit legislative intent of § 332(c)(7).[1] The League then provides examples of wireless ordinances in the City and County of San Francisco and the County of San Diego which distinguish between different tiers of use, with preferred locations being subject to less review.[2] These ordinances take into account, and attempt to resolve in a reasonable manner, the complex siting decisions that Congress anticipated when it expressly preserved local zoning authority under § 332(c)(7)(A). The City of San Diego agrees with the League of California Cities that imposition of the arbitrary time limits that CTIA demands would violate Congress' clear intent.

The City of San Diego provides clear guidance for wireless carriers through use of the four tiers of use described in its wireless ordinance.[3] The lowest level of review applies to industrial and commercial areas and certain collocated facilities. The highest level of review applies to open space, parks, and residential zones.

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[1] League of California Cities Opening Comments, p.4
[2] *Id.* at 12.
[3] San Diego Municipal Code § 141.0420.

Regardless of the level of review or type of permit being sought, the City of San Diego's initial review of a project typically takes 30 or less business days. After the initial review, an "assessment letter" is mailed to the applicant describing issues, if any, that the applicant should address to be in compliance with the City's regulations. If issues exist, the applicant is given 90 days to submit revised plans to the City that address the comments presented in the first assessment letter. Applicants are welcome to submit their response in less than 90 days.

If all issues have been addressed, the City may then take an action on the project. This action consists of either a staff level decision (for a site subject to a lower tier review), or a decision made by a public hearing body (for sites subject to higher tier review).[4] If the issues raised by staff are not addressed, a second assessment letter will be sent to the applicant.

The time frame that is required to review a project depends on the timely submissions of the applicant and the reviews of staff. Requiring a final action within 45 days (for collocation projects) and 75 days (for all other projects) would not provide enough time for the City and the applicant to adequately address all the issues that could be presented by a project. Since a typical first review is 30 business days, the applicant might only have 15 days to respond to the City's initial review before the City could be deemed as "not taking a final action" on the review of a project. CTIA's petition does not adequately address the possibility that the failure of a wireless carrier to quickly address a city's legitimate permitting issues could actually lead to mandatory approval of a wireless site.

[4] San Diego Municipal Code § 112 *et seq.*

Moreover, in addition to local requirements, the California Government Code mandates that local governments follow specific time requirements for providing notice of public meetings and posting agendas.[5] The law, known as the Brown Act, also does not allow a majority of decision-makers (such as the members of a planning commission) to privately discuss or deliberate upon matters that will appear on an agenda for a public meeting. It would be extremely difficult to satisfy these notice requirements if CTIA's proposed 45 and 75 day deadlines were imposed.

The State of California also imposes additional procedural requirements through the California Environmental Quality Act ("CEQA").[6] In cases where CEQA applies to wireless siting decisions, it may be necessary for local governments to prepare an environmental impact report or determine measures to mitigate adverse environmental effects. These requirements necessitate additional time for final review of some wireless siting decisions.

II. THE WIRELESS CARRIERS FAIL TO SHOW THAT LOCAL GOVERNMENTS FAIL TO ACT WITHIN A REASONABLE PERIOD OF TIME TO DECIDE WIRELESS SITING APPLICATIONS

CTIA's petition, and supporting comments submitted by Verizon and Sprint, failed to provide specific examples of unreasonable delays that could be analyzed and verified. Specific local governments are generally not named in the comments in support of CTIA's petition. For example, Verizon's comments reference "Northern California", "Southern California" and the "San Diego area."[7] It is unclear whether the reference was

[5] California Government Code § 54950 *et. seq.*
[6] California Public Resources Code § 21000 *et. seq.*
[7] Verizon Opening Comments, pp.6-7

to the City or County of San Diego. San Diego County includes nineteen separate jurisdictions—it is unclear which are implicated in Verizon's comments. Sprint also does not reference specific local governments, but instead refers to "a few California communities" and an unnamed California county.[8]

Comments that the California Wireless Association ("CALWA") submitted to the Commission offered only limited examples of what it considered to be unreasonable siting delays. However, even those limited examples ignore several pertinent details that indicate that the applicant, and not the city in question, was responsible for the delay.

For example, the second paragraph of Article II of CALWA's comments state that a telecommunications tower company applied for a conditional use permit in the City of San Diego in December of 2005 and the City denied the application in February of 2008. However, the facts are more complex than CALWA's brief summary implies. A fair reading of the facts reveals that the applicant caused the delay in reaching a final determination on its application. The tower company applied for a permit at a site where a tower existed but a prior permit had expired. The permit was not automatically renewable, so a new permit application was required. The tower in question did not comply with the City's regulations. Therefore, within thirty days of the application, the City denied the permit application. Concurrent with rejection of the application, the City provided the tower company with a list of proposed changes to allow the tower to satisfy permitting requirements. The tower company chose not to resubmit its application. Instead, it sought to change the City's permitting requirements—initially through the political process and then by filing a lawsuit.

[8] Sprint Opening Comments, p.5

In order to include the permit denial in its lawsuit, the tower company finally agreed to appear at a planning commission hearing. The hearing was held at the first available date and the commission denied the permit. It was the applicant's delay in requesting a hearing which led to the administrative process being completed in 2008 instead of 2006.

The City of San Diego is familiar with the facts surrounding the tower company siting case referenced in CALWA's comments. However, most of the limited examples provided in CTIA's petition, and comments in support of the petition, fail to provide enough specificity to allow for comprehensive analysis of the facts that are provided. The inadequate information provided may indicate that CTIA and its supporters were able to find few true examples of unreasonable delays in wireless siting decisions.

III. CONCLUSION

The Commission has all the information it needs to conclude that CTIA's proposals directly contravene § 332(c)(7). The Commission should immediately dismiss CTIA's Petition.

DATED: October 14, 2008

Respectfully submitted,

CITY OF SAN DIEGO

By

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